SUPREME COURT, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1271

HENRY E. COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY .... PETITIONER

vs.

MAXWELL OLIVER ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, Henry E. Cowan, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided November 21, 1973.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit is reported as *Oliver* v. *Cowan,* 487 F.2d 895 (6th Cir. 1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on November 21, 1973. This petition was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER A SHOWING OF PREJUDICE TO SUBSTANTIAL RIGHTS AS THE RESULT OF THE LACK OF COUNSEL AT FINAL SENTENCING IS REQUIRED BY A HABEAS CORPUS APPLICANT WHEN THE JURY IS REQUIRED TO ASSESS THE SENTENCE AND THE JUDGE HAS NO DISCRETION ON THE IMPOSITION OF SAID SENTENCE.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution involved are the Sixth and the Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On January 21, 1959, in the Harlan Circuit Court, Harlan County, Kentucky, the respondent, Maxwell Oliver, with the assistance of counsel, entered a plea of guilty to the offense of wilful murder and his punishment was fixed by a jury at life imprisonment.

On February 27, 1973, the United States District Court for the Eastern District of Kentucky, the Honor-

able Bernard T. Moynahan, Jr., Judge, entered an Order sustaining petitioner's petition for habeas corpus relief. The District Court found, as a matter of fact, that petitioner was not represented by counsel at his final sentencing. As a conclusion of law, the District Court stated:

> "The formal sentencing is a critical stage in a criminal proceeding to which a defendant is entitled to assistance of counsel, when such sentence is imposed pursuant to punishment fixed by a jury as part of its verdict."

The petitioner appealed the order of the District Court to United States Court of Appeals for the Sixth Circuit. An *Agreed Statement of the Case, Findings of Fact and Conclusions of Law and Judgment Appealed From* was filed and certified to the Court of Appeals, pursuant to Federal Rules of Appellate Procedure, Rule 10(d).

The sole issue presented on appeal was: 'Whether formal sentencing is a critical stage in a criminal proceeding in Kentucky to which a defendant is entitled to assistance of counsel, when such sentence was imposed pursuant to punishment fixed by a jury as a part of its verdict after the defendant has entered a plea of guilty with the advice and assistance of counsel."

On November 21, 1973, the Sixth Circuit Court of Appeals affirmed the judgment of the District Court. The Court of Appeals directed that upon remand an order will be entered granting the habeas corpus pe-

tition of Maxwell Oliver unless he is resentenced with either retained or appointed counsel present within sixty (60) days from the entry of such order. It is from this Judgment that a review is sought.

REASONS FOR GRANTING THE PETITION

This petition should be granted due to the direct conflict between the decisions of the United States Sixth Circuit Court of Appeals and other circuit courts of appeal on the same matter of general law. This decision involves the question of whether or not prejudice must be shown by the absence of counsel at final sentencing when the jury assesses the punishment and the judge has only the ministerial duty of pronouncing this sentence. This Court should note that this decision is in direct conflict with both the Fifth and the Eighth Circuit Courts of Appeal and with decisions of the Court of Appeals of Kentucky.

The Court of Appeals of Kentucky has held that sentencing is not a critical stage and the presence of counsel is not required where the duty of the trial judge at final sentencing is purely ceremonial. The Kentucky Court of Appeals, in *McIntosh* v. *Commonwealth*, 368 S.W.2d 331 (1963), noted that Kentucky is one of the few states in which the degree of punishment is required to be fixed by the jury and "when the court has no discretion with respect to assessing punishment, the allocution and pronouncement of sentence are more ceremony than substance." See, also, *Collins* v. *Commonwealth*, Ky.,

433 S.W.2d 663 (1968), and *Thomas* v. *Commonwealth*, Ky., 437 S.W.2d 512 (1969).

The conflict between the Sixth Circuit and other circuits is evidenced by decisions of the Fifth and Eighth Circuits which involve cases arising out of a conviction had in a state where, like Kentucky, the punishment is assessed by the jury and the trial judge has no discretion concerning punishment. In *Fairris* v. *Beto*, 446 F.2d 1290 (5th Cir. 1971), the Fifth Circuit Court of Appeals decided that a petitioner convicted in Texas bears the burden of proving how he was prejudiced by lack of counsel at sentencing. The Court there stated:

> ". . .In this specific factual setting counsel is not required by due process of law standards. The sentencing was of a purely mechanical nature, carrying out the mandates of the jury. *See* Vitoratos v. Maxwell, 351 F.2d 217 (6th Cir. 1965), appeal dismissed, 383 U.S. 105, 86 S.Ct. 718, 15 L.Ed.2d 618 (1966); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). *Petitioner has not shown how he was prejudiced by the lack of counsel*, nor could he from the facts set out herein. The decision of Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), is not controlling here. *See* Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)." (Emphasis added.)

The Eighth Circuit Court of Appeals has also rendered a decision directly in conflict with the Sixth Circuit. In *McClain* v. *Swenson*, 435 F.2d 327 (8th Cir. 1970), the Eighth Circuit, in a case arising out of a Missouri conviction, concluded that in order for a petitioner to be

entitled to habeas corpus relief, it was necessary that he show prejudice by the lack of counsel at formal sentencing. The Sixth Circuit's decision indicates that all that needs to be proven is the physical absence of counsel at final sentencing and prejudice per se is presumed from this fact. For this reason, it is readily apparent that there is a direct conflict between the various circuit courts of appeal, and certiorari should be granted in order to resolve this conflict.

This petition should also be granted because it presents a substantial question of Federal law which is of particular importance because it will directly affect an untold number of valid state court convictions and possibly allow convicted felons to be set free after a long period of incarceration. As is noted by the Kentucky Court of Appeals in *McIntosh* v. *Commonwealth*, supra, there are nine states which, with various exceptions, provide that a jury may or must assess punishment.

The impact of the Sixth Circuit's decision is that, in many of these states, like Kentucky, it would be possible for a petitioner to merely prove that his counsel was not physically present at sentencing. Based upon the Sixth Circuit's decision, prejudice would then be presumed and it would be incumbent upon the state to disprove this prejudice.

After the writ of habeas corpus is granted upon this bare allegation, it will be necessary for the state to resentence the petitioner with counsel present. This in itself would not be a great burden upon the states. However, the Kentucky Rules of Criminal Procedure

provide (as no doubt the rules of other states do) that a defendant can withdraw his plea of guilty at any time before final judgment. It is entirely possible, therefore, that the petitioners involved could withdraw their guilty pleas and demand to be tried upon a charge which may be as much as thirty years old. Needless to say, this would be difficult if not impossible in most all of the cases.

CONCLUSION

The Sixth Circuit has held that the absence of counsel at final sentencing is per se prejudicial to a defendant's substantial rights. The Fifth and Eighth Circuits have held that prejudice must be proven. Petitioner submits that it is necessary for the Court to review the decision of the Sixth Circuit to settle this conflict.

Respectfully submitted,

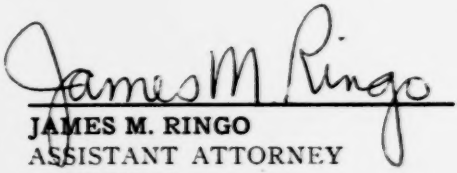
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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for petitioner, hereby certify that the foregoing Petition was served on respondent by depositing three copies of same in the United States mail, first class postage prepaid, on February 15, 1974, addressed to counsel for respondent, Honorable Curtis L. Wilson, 234 N. Limestone Street, Lexington, Kentucky 40507.



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APPENDIX A

No. 73-1474

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

MAXWELL OLIVER — Petitioner-Appellee,

v.

HENRY E. COWAN, Superintendent, etc. — Respondent-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed November 21, 1973.

BEFORE: EDWARDS and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

PER CURIAM. This is an appeal from an order granting habeas corpus relief to a prisoner who is serving a life sentence imposed by a jury following a plea of guilty. Upon indictment for willful murder, Maxwell Oliver pled guilty with the assistance of appointed counsel on January 21, 1959. Under Ken-

tucky procedure the jury fixed the punishment in criminal cases and was permitted in this case to decree either death or life imprisonment. On the same day that the jury verdict was received, the court passed formal sentence of life imprisonment in the absence of counsel for Oliver. The question presented is whether, under the circumstances of this case, formal sentencing was a critical stage in the criminal proceedings at which the defendant was entitled to the assistance of counsel.

Under the code of criminal practice in effect in Kentucky in 1959 the court was permitted to enter judgment immediately in cases involving guilty pleas while being required to wait two days before rendering judgment in other cases. Kentucky Criminal Code, Section 283; *Sorke* v. *Commonwealth*, 271 Ky. 482, 112 S.W.2d. 676 (1938). The Code did not refer to sentencing, but prescribed certain procedures in connection with "rendering judgment" in criminal cases. References to "sentencing" and "pronouncing judgment" were held to have the same meaning in *Lovelace* v. *Commonwealth*, 285 Ky. 326, 147 S.W.2d. 1029 (1941).

The Criminal Code, § 284, provided that the judgment of the court should affix the degree of punishment to be inflicted as found by the verdict of the jury or fixed by law. Section 285 required the presence of the defendant at the time that judgment was rendered against him in cases of felony and § 286 provided, "When the defendant appears for judgment, he must be informed by the court of the nature of the indictment, his plea and the verdict thereon, if any; and he

must be asked if he has any legal "cause to show why judgment should not be pronounced against him." The next section of the Criminal Code, number 287, then provided causes which a defendant might impose to prevent the rendition of judgment against him. These included ". . . any sufficient ground for a new trial, or for arrest of judgment; [or] . . . that he is insane." Since Kentucky procedure required that he be asked at formal sentencing if he had any legal cause why sentence should not be pronounced, it would appear that the assistance of counsel would be required to advise the defendant if any of the causes set forth in Section 287 existed in his case.

In his brief, the respondent argues that the defendant would have had ample opportunity to present any reasons why judgment should not have been rendered in accordance with the verdict upon his motion for a new trial or for probation, quoting from *McIntosh* v. *Commonwealth*, Ky., 368 S.W.2d 331, 335 (1963). In 1959 a person serving a life sentence in Kentucky was ineligible for probation pursuant to Kentucky Revised Statutes, § 439.020. On page 12 of his brief the respondent states, "A defendant could not make a motion for a new trial in a case where he has pleaded guilty." Thus the two opportunities for presenting reasons why judgment should not be rendered in accordance with the verdict were not available to the petitioner Oliver at a time subsequent to formal sentencing, which increased the importance of counsel at sentencing in his case.

Section 174 of the Criminal Code in effect in 1959 provided that the court could permit a plea of guilty to

be withdrawn and a plea of not guilty substituted "[a]t any time before judgment." Certainly the presence of counsel would be required for an intelligent determination of whether a change of plea should be undertaken. Cf. *Mempa* v. *Rhay*, 389 U.S. 128, 136 (1967).

In *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Supreme Court held that a defendant in a criminal case ". . . requires the guiding hand of counsel at every step in the proceedings against him." 287 U.S. at 69. Even though under the 1959 Kentucky procedure the judge did not determine the degree of punishment, we view formal sentencing as more than a mere ministerial ceremony in light of the possible steps available to the defendant at that proceeding.

Although Kentucky continues to require that the jury fix the degree of punishment, new Rules of Criminal Procedure were adopted in 1962 and the issue decided here has not been presented to this Court in a case tried under the new rules.

The judgment of the district court is affirmed. Upon remand an order will be entered granting the habeas corpus petition of Maxwell Oliver unless he is resentenced with either retained or appointed counsel present within 60 days from the entry of such order.